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No. 92-0073

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JACK W. CONAWAY,

Petitioner,

vs.

CONTROL DATA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Supreme Court of Texas has recognized a cause of action for negligent infliction of emotional distress, may the Court of Appeals for the Fifth Circuit disregard *Erie v. Tompkins* and the Rules of Decision Act by refusing to apply the cause of action to an employment context?

2. Has the Court of Appeals for the Fifth Circuit denied petitioner his right to trial by jury under the Seventh Amendment to the United States Constitution by refusing to recognize petitioner's cause of action for negligent infliction of emotional distress in an employment context?

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STATEMENT OF THE CASE

Control Data accepts petitioner's Statement of the Case and only adds that the trial court properly made its decision to grant judgment n.o.v. based, not only on the facts of the *Conaway* case, but on the basis of established Texas law which, at this time, does not recognize the tort of negligent infliction of emotional distress based on termination in an employer/employee setting. *See* Petitioner's Appendix, page 34.

STATEMENT OF JURISDICTION

Petitioner has not identified any grounds for a writ of certiorari to be granted in this case. Grant of such a writ is not a matter of right. 28 U.S.C.A. § 1254. The Supreme Court grants such writs where special and important reasons have been shown to exist.

In this case petitioner does not even allege that special and important circumstances exist. There is no conflict between circuits to be resolved, no federal question, and absolutely no departure from precedent occurred in the case below.

SUMMARY OF ARGUMENT

For the following reasons, Control Data Corporation respectfully prays that a writ of certiorari will not issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on March 10, 1992.

I. Texas has not recognized a cause of action for negligent infliction of emotional distress.

Petitioner's statement that Texas has recognized negligent infliction of emotional distress as a cause of action is misleading because Texas courts have specifically noted that the cause of action does not apply to the employment setting. Thus, Control Data was properly granted judgment n.o.v. below. As petitioner argues, the federal court must, and in this case did, follow applicable state law regarding the pendent claims.

II. There is no Texas precedent that supports petitioner's assertion that the Texas Supreme Court would have favored his claim.

Petitioner argues that as to his negligence claim, Texas law

must be followed, but asks this Court to speculate that Texas law would be favorable to him rather than follow Texas law set forth in cases on point.

III. The district court's grant of judgment n.o.v. was based on law not on the facts of the case, thus the province of the jury was not invaded.

Petitioner argues that he should be allowed recovery under a cause of action that does not exist. That would have been the outcome here if judgment n.o.v. had not been granted. Respondent would have been denied its right to a fair trial because respondent was not presenting a defense against "negligent termination." Knowing that there was no such cause of action, respondent concentrated on the breach of contract and age discrimination claims. By granting judgment n.o.v., the district court simply followed the law of the State of Texas and took a case from the jury that really should not have gone to the jury in the first place.

IV. Petitioner has not been denied his right to a jury trial.

Since Texas does not recognize a negligent termination cause of action, petitioner did not have a right to a trial on that issue at all. Thus a grant of judgment n.o.v. did not deny petitioner any of his rights.

REASONS FOR DENYING THE WRIT

I.

TEXAS HAS NOT RECOGNIZED A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN AN EMPLOYER/EMPLOYEE SETTING.

Petitioner improperly asserts that Texas has recognized a cause of action for negligent infliction of emotional distress in the employment context. The only Texas precedent petitioner cites in support of his first question for review is *City of Ingleside v. Kneuper*, 768 S.W. 2d 451, 460 (Tex. App. Austin 1989, writ denied). This is not a case of common law negligent infliction of emotional distress but a case brought under the Texas whistle-blower statute. In the case at bar, there has been no finding of wrongful termination, consequently *City of Ingleside* does not support petitioner's assertion that Texas recognizes his attempted cause of action.

The *City of Ingleside* decision cited by petitioner, follows the logic of *Fiorenza v. First City Bank*,[1] 710 F. Supp. 1104, 1105 (E.D. Tex. 1988), a Texas case on point. *Fiorenza* states that the "Texas Supreme Court does not yet recognize a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress." *Fiorenza*, 710 F. Supp. 1104, 1105. The court in *Fiorenza* goes on to observe that Texas has carved out one exception[2] and that is the situation where an employee refuses to

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1. *Fiorenza v. First City National Bank* and *Williams v. Sealed Power Corp.* were relied on by both the district court and the Fifth Circuit Court of Appeals in their decisions below.

2. The court noted one edception to the rule that: the cause of action for negligent infliction of emotional distress does not exist in Texas in the employer/employee setting.

violate a criminal statute. *Id. City of Ingleside v. Kneuper*, was not a common law case but, logically, it falls into the only exception noted by the *Fiorenza* court. Petitioner's claim does not fall within that exception and, recognizing this, he has not even alleged that it does.

It was the *Fiorenza* decision that was relied on by the United States District Court in *Williams v. Sealed Power Corporation*, No. 4-88-254-E (N.D. Tex. 1990) (1990 W.L. 102799) when it dismissed a pendent state claim for negligent infliction of emotional distress based on termination. The *Williams* court noted that Texas does not recognize negligent infliction of emotional distress in the employer/employee setting (citing to *Fiorenza*), and thus dismissed the claim with prejudice.

The United States Supreme Court depends upon district courts and courts of appeals for initial determinations of questions of state law and its practice is to show deference to such determinations. *Cort v. Ash*, 422 U.S. 66. It is clear that the *Williams* court, the district court in this case, and the Fifth Circuit Court of Appeals, all determined the current state of Texas law regarding the issue presented by petitioner. The courts below then applied that law, quite properly to this case. Consequently, review of this decision is unnecessary. *Cort v. Ash*, 422 U.S. 66.

II.

PETITIONER IS MERELY SPECULATING WHEN HE STATES THAT THE TEXAS SUPREME COURT WOULD HAVE FAVORED HIS CLAIM.

Petitioner, while arguing that the courts must apply Texas law to his negligent infliction of emotional distress claim, fails to cite any Texas precedent that supports his position.

Petitioner cites several Texas cases dealing with *intentional* infliction of emotional distress. *See Havens v. Tomball Community Hospital*, 793 S.W. 2d 690 (Tex. App. Houston (1st Dist.) 1990, no writ); *Bushell v. Dean*, 781 S.W. 2d 652 (Tex. App. Austin 1989); *Service Lloyds Ins. Co. v. Greenhallgh*, 771 S.W. 2d 688 (Tex. App. Austin 1989, no writ); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989); *Massey v. Massey*, 807 S.W. 2d 391 (Tex. 1990). However, intentional infliction of emotional distress is not a claim that remained in petitioner's case at the time of trial and it is not a point on appeal.

After raising intentional infliction of emotional distress, a claim disposed of by summary judgment in this case, as a valid cause of action in Texas, petitioner launches into a convoluted review of various decisions intended to lead to the conclusion that the Texas Supreme Court would, at this time, recognize a cause of action for negligent infliction of emotional distress in an employer/employee setting. This entire argument is flawed because petitioner cannot point to a case that supports his conclusion.

Recognizing the weakness in the argument, petitioner then cites to "sister circuits" which have recognized, to one degree or another, negligent infliction of emotional distress in or outside the employer/employee setting. This tact cannot advance his cause because Texas law is at issue here.

The only relevant precedent to this case is Texas precedent, which has been identified above as clearly in support of both decisions below.

III.

THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY GRANTED JUDGMENT N.O.V. IN THE CASE BASED ON THE LAW OF THE STATE OF TEXAS. THIS IS THE PROPER APPLICATION OF *ERIE V. TOMPKINS.*

Erie R. v. Tompkins, 304 U.S. 64 (1938) requires federal courts to apply state law to state law claims that come before federal courts as in this case, based on the pendent jurisdiction of the federal court to resolve all issues in the case. In the case at bar, the federal magistrate was the judge before whom the parties agreed to try this case. Magistrate Pecht properly applied Texas law to the facts of the case. Texas law, contrary to what petitioner would have this Court believe, does not recognize the independent tort of negligent infliction of emotional distress in the employer/employee setting absent wrongful discharge.

Petitioner is correct that Texas, like many other jurisdictions does recognize the tort of negligent infliction of emotional distress. *St. Elizabeth Hospital v. Gerrard,* 730 S.W. 2d 649, 654 (Tex. 1987). Texas also recognizes the tort of intentional infliction of emotional distress in the employer/employee setting. *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 157 (E.D. Tex. 1987). However, the claim petitioner attempted to recover for is really negligent termination. His alleged emotional distress resulted from his termination. This is not a tort that is recognized in Texas. *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). *See also, Williams v. Sealed Power Corp.*, 1990 W.L. 102799 (N.D. Tex 1990); *Soto v. Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991).

Petitioner makes two arguments in support of the theory that Texas allows the negligent termination cause of action. First, he states the district court should have looked to sister states to determine Texas law in this area since the Texas position is unclear. Alternatively, petitioner suggests that since the Texas Supreme Court has never specifically stated that the cause of action *does not* exist, the district court was obligated to recognize the cause of action.[3] Unfortunately for petitioner, Texas law on this issue *is* clear, and review of the laws of other jurisdictions is both unnecessary and inappropriate. Texas simply does not acknowledge a cause of action for negligent termination. *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). *See also, Williams v. Sealed Power Corp.*, 1990 W.L. 102799 (N.D. Tex. 1990); *Soto v. Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991). Thus both the district court and the Fifth Circuit properly granted and upheld judgment n.o.v. on that basis.

IV.

PETITIONER HAS NOT BEEN DENIED HIS RIGHT TO A JURY TRIAL.

It is clear from the argument above, that Texas does not recognize a cause of action for negligent infliction of emotional distress in the employment setting. That is exactly the claim that petitioner wanted to put to a jury. When a cause of action does not exist, and judgment n.o.v. is granted for that reason, no right is denied, because no right existed in the first place.

The judgment n.o.v. in this case did not invade the province of the jury because it was based solely on legal issues which are the province of the court.

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3. In our legal system, we do not assume that a law exists if it is not enumerated, we pass a law when there is a need.

CONCLUSION

For the reasons stated above, this Court should deny Mr. Conaway's petition for a writ of certiorari.

Respectfully submitted,

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